No. 47406-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Dwayzsha Cantley,

Appellant.

Thurston County Superior Court Cause No. 14-1-00876-1

The Honorable Judge Gary R. Tabor

Appellant's Opening Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON STATE CASES

CONSTITUTIONAL PROVISIONS

WASHINGTON STATUTES

OTHER AUTHORITIES

ISSUES AND ASSIGNMENTS OF ERROR

1. The trial judge erroneously refused to consider Ms. Cantley's self-defense claim.

2. The trial judge applied the wrong legal standard in refusing to consider self-defense.

3. The trial judge erroneously failed to take the evidence in a light most favorable to Ms. Cantley in deciding whether or not to consider her self-defense claim.

4. The trial judge erroneously required Ms. Cantley to show actual danger as a prerequisite to arguing self-defense.

5. The trial judge did not determine whether or not the state met its burden of proving the absence of self-defense beyond a reasonable doubt.

> **ISSUE 1:** In a bench trial, the judge must evaluate evidence in a light most favorable to the defense before deciding whether to consider the accused person's self-defense claim. Did the trial judge apply the wrong legal standard when he refused to consider Ms. Cantley's self-defense claim?
>
> **ISSUE 2:** A person claiming self-defense is entitled to act on appearances, and need not show actual danger of injury. Did the trial judge erroneously require Ms. Cantley to show actual danger of injury as a prerequisite to her self-defense claim?

6. Ms. Cantley's conviction for third-degree assault violated her Fourteenth Amendment right to due process.

7. The evidence was insufficient to prove the absence of self-defense.

8. The evidence was insufficient to prove that Ms. Cantley assaulted VanHoute with intent to prevent a lawful detention.

> **ISSUE 3:** Once an accused person presents some evidence of self-defense, the burden shifts to the prosecution to prove the absence of self-defense beyond a reasonable doubt. Did the

state fail to prove the absence of self-defense beyond a reasonable doubt?

ISSUE 4: A conviction for third-degree assault requires proof of an assault committed with intent to resist a lawful apprehension or detention. Did the state present insufficient evidence to prove that Ms. Cantley assaulted another with intent to resist a lawful apprehension or detention?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Dwayzsha Cantley is a 19 year old with no prior criminal history. CP 24; RP (3/4/15) 3, 10. She worked as a caregiver and a daycare teacher. RP (3/4/15) 11-12.

Ms. Cantley shoplifted $172 of merchandise from J.C. Penney. Ex. 1, 4; RP (1/27/15) 41-44. As she was leaving the store, a man approached her. RP (1/27/2015) 29. He did not show a badge, and he was not wearing a uniform. RP (1/27/15) 73. He may have been wearing jeans and a hoodie. RP (1/27/15) 73.

The man grabbed her arm and said he was detaining her for theft. RP (1/27/2015) 29, 30. She pulled away from him. RP (1/27/15) 29, 192.

He did not directly ask her to return to the store. RP (1/27/15) 96, 173. He let go of her, thinking she was going to follow him back inside the store, but she did not go with him. RP (1/27/15) 29, 95-96, 192.

The man grabbed her purse and the two tugged at it. RP (1/27/15) 30, 192-193. He grabbed her arm again. RP (1/27/15) 30. She "got scared" and her "adrenaline kicked in." RP (1/27/15) 116, 127, 154. She "just kind of freaked out," and slapped him. RP (1/27/15) 30, 74, 154, 193; RP (3/4/15) 19.

The man then forced Ms. Cantley onto the ground, holding her there while he called 911 on his cell phone. RP (1/27/15) 32. Ms. Cantley kept trying to get back up, and he repeatedly pushed her back down on the ground. RP (1/27/15) 32-33. At no time did he show her a badge or other identification. RP (1/27/15)73.

The state charged Ms. Cantley with third-degree assault and theft. CP 6; RP (1/27/15) 8-9. Ms. Cantley waived her right to a jury trial, and submitted her case to the bench. RP (1/27/15) 5.

The man who pushed Ms. Cantley to the ground was James VanHoute. He worked as a J.C. Penney loss prevention supervisor when he grabbed Ms. Cantley. RP (1/2715) 12. He is currently self-employed with a "marijuana-based company." RP (1/27/15) 12, 49. At trial, it emerged that VanHoute violated requirements of the J.C. Penney Loss Prevention Manual in his observation and apprehension of Ms. Cantley. RP (1/27/15) 170-171, 188.

Someone should have checked the fitting room before Ms. Cantley entered. Ex. 7. Someone should have counted the number of items she took into the fitting room. Ex. 7. As a male loss prevention officer, VanHoute shouldn't have been the person to maintain observation of Ms. Cantley while she was in the fitting rooms. Ex. 7, p. 35; RP (1/27/15) 57.

Nor should he have checked the fitting room after she left. Ex. 7, p. 35; RP (1/27/15) 50, 80.

He should have approached her calmly, identified himself by name, and shown her his badge. Ex. 7, p. 39. He shouldn't have apprehended her alone. Ex. 7, p. 39; RP (1/27/15) 33. He shouldn't have attempted to grab her purse. Ex. 7, p. 40; RP (1/27/15) 31.

VanHoute was previously disciplined with regard to loss prevention apprehension activities while working at J.C. Penney. RP (1/27/15) 48. He's also been disciplined for using an aggressive tone of voice. RP (1/27/15) 71.

At trial, Ms. Cantley presented a self-defense claim. She argued that she was entitled to defend herself against VanHoute's use of force. CP 45-46; RP (1/27/15) 173-174.

The trial judge refused to consider self-defense. He erroneously stated that Ms. Cantley had conceded the argument. RP (1/27/15) 193. He announced that he would not have instructed a jury on self-defense, "because there was no evidence that any force used by the defendant was to prevent injury." RP (1/27/15) 193.

The trial court also found that VanHoute lawfully detained Ms. Cantley, despite his failure to follow J.C. Penney's requirements for making apprehensions. RP (1/27/15) 188, 192-193, 194-195.

Ms. Cantley was convicted of both offenses at a bench trial. CP 26-33; RP (1/27/15) 187. She became a convicted felon at the age of 19 years old. CP 26; RP (3/4/15) 10.

Ms. Cantley filed a timely notice of appeal. CP 34.

ARGUMENT

I. THE TRIAL JUDGE ERRONEOUSLY REFUSED TO CONSIDER MS. CANTLEY'S SELF-DEFENSE CLAIM.

Throughout the proceedings, Ms. Cantley claimed self-defense, arguing that she was justified in slapping VanHoute when he grabbed her arm. CP 9; RP (1/27/15) 138-139, 173-174.

The trial judge erroneously stated that Ms. Cantley had conceded her self-defense claim. RP (1/27/15) 193. The judge went on to say that he would not have instructed a jury on self-defense, and concluded that "[t]here is no evidence as to self-defense and I'm disregarding that." RP (1/27/15) 193.

In a bench trial, the judge must consider an accused person's self-defense claim whenever the evidence would require instructions on self-defense in a jury trial. *State v. Read*, 147 Wn.2d 238, 242, 53 P.3d 26 (2002). Here, the trial judge erroneously failed to consider Ms. Cantley's self-defense claim.

The judge must consider self-defense if there is "'some evidence demonstrating self-defense.'" *State v. McCreven*, 170 Wn. App. 444, 462, 284 P.3d 793 (2012) (quoting *State v. Walden,* 131 Wn.2d 469, 473–74, 932 P.2d 1237 (1997)). This burden is a low one. *State v. George*, 161 Wn. App. 86, 96, 249 P.3d 202 (2011).

Furthermore, the evidence is viewed in a light most favorable to the defendant. *Id.* In a bench trial, the judge "must view the evidence from the standpoint of a reasonably prudent person who knows all the defendant knows and sees all the defendant sees." *Read*, 147 Wn.2d at 242.

A person is entitled to "act on appearances." WPIC 17.04; *see, e.g., State v. Kyllo*, 166 Wn.2d 856, 215 P.3d 177 (2009). Actual danger is not required. WPIC 17.04.[1]

Here, the trial judge applied the wrong legal standard and erroneously refused to even consider Ms. Cantley's self-defense claim. As a result, the court did not determine whether or not the state had disproved self-defense beyond a reasonable doubt.

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[1] A different standard applies when a person uses force against a law enforcement or corrections officer. In such cases, the person must *actually* face an imminent danger of serious injury or death. *State v. Calvin,* 176 Wn. App. 1, 14, 316 P.3d 496 (2013); *see also State v. Bradley,* 141 Wn.2d 731, 737, 10 P.3d 358 (2000).

First, the court did not view the evidence in a light most favorable to Ms. Cantley. *George,* 161 Wn. App. at 95-96. When VanHoute approached Ms. Cantley, he wasn't wearing a uniform. He may even have been wearing jeans and a hoodie. (1/27/15) 73. He didn't identify himself by name or present a badge. (1/27/15) 73. He has been disciplined for using an "aggressive tone of voice." (1/27/15) 71.

Ms. Cantley told police that when VanHoute grabbed her and tugged at her purse, she was "scared." RP (1/27/15) 116, 127, 154. VanHoute quickly escalated the encounter and brought Ms. Cantley to the ground. RP (1/27/15) 29-30.

The trial judge should have taken this evidence in a light most favorable to Ms. Cantley. *George*, 161 Wn. App. at 96. Had he done so, he would have considered her self-defense claim. Contrary to the court's statement, she did not concede the issue. RP (1/27/15) 193. She presented at least "some" evidence of self-defense. *McCreven*, 170 Wn. App. at 462.

Second, the court erroneously required proof of actual danger. The judge told the parties he would not have instructed on self-defense "because there was no evidence that any force used by the defendant was to prevent injury." RP (1/27/15) 193. But Ms. Cantley was entitled to act on appearances. *See* WPIC 17.04. She was not required to show actual danger of injury. WPIC 17.04.

The trial court erred as a matter of law by refusing to consider Ms. Cantley's self-defense claim. *George*, 161 Wn. App. at 96. If the evidence is deemed sufficient, the case must be remanded for a new trial.[2] *McCreven*, 170 Wn. App. at 453.

II. THE EVIDENCE WAS INSUFFICIENT TO CONVICT MS. CANTLEY OF THIRD DEGREE ASSAULT.

A challenge to the sufficiency of the evidence may always be raised for the first time on review. *State v. Kirwin,* 166 Wn. App. 659, 670 n. 3, 271 P.3d 310 (2012); RAP 2.5(a)(2) and (3). The appellant admits the truth of the state's evidence and all reasonable inferences that can be drawn from it. *State v. Homan,* 181 Wn.2d 102, 106, 330 P.3d 182 (2014). Nevertheless, the existence of a fact cannot rest upon guess, speculation, or conjecture. *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006).

A. The state failed to prove the absence of self-defense.

Due process requires the state to prove beyond a reasonable doubt all facts necessary to constitute the crime charged. *State v. W.R., Jr.*, 181 Wn.2d 757, 762, 336 P.3d 1134 (2014). Once the defendant produces some evidence of self-defense, "'the burden shifts to the prosecution to

[2] If the evidence is insufficient, as argued below, the charge must be dismissed with

prove the absence of self-defense beyond a reasonable doubt.'" *McCreven*, 170 Wn. App. at 462 (quoting *Walden,* 131 Wn.2d at 473–74).

The evidence at trial showed that VanHoute approached Ms. Cantley in regular clothes—possibly jeans and a hoodie. RP (1/27/15) 73. These civilian clothes would not have conveyed to her that he was approaching her in an official capacity. RP (1/27/15) 73, 157.

He acknowledged that he has been disciplined for using an aggressive voice. RP (1/27/15) 71. Ms. Cantley slapped him only when he grabbed her arm and then her purse. RP (1/27/15) 30. She was scared and fueled by adrenaline. RP (1/27/15) 116, 127, 154.

The prosecution did not present any evidence refuting Ms. Cantley's self-defense claim. She was entitled to act on appearances, and to use reasonable force to resist VanHoute's aggression.

The evidence was insufficient to prove the absence of self-defense. Accordingly, the assault conviction must be reversed and the charge dismissed with prejudice. *Irby,* 187 Wn. App. at 204.

B. The state failed to prove that Ms. Cantley acted with intent to resist a lawful apprehension or detention.

To prove third-degree assault, the prosecution was required to prove that Ms. Cantley intended to prevent or resist a lawful apprehension.

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prejudice. *State v. Irby*, 187 Wn. App. 183, 204, 347 P.3d 1103 (2015).

RCW 9A.36.031(1)(a); *State v. Hoffman*, 35 Wn. App. 13, 16, 664 P.2d 1259 (1983). The evidence was insufficient to prove that VanHoute lawfully apprehended Ms. Cantley, or that she acted with intent to resist the apprehension.

Security officers are allowed to detain a suspected shoplifter "in a reasonable manner if they have reasonable grounds to believe the person is committing or attempting to commit theft or shoplifting." *State v. Johnston*, 85 Wn. App. 549, 554, 933 P.2d 448 (1997). A store's manual is relevant to a determination of what is reasonable in this context. *K-Mart Corp. v. Washington*, 109 Nev. 1180, 1189, 866 P.2d 274 (1993).

J.C. Penney requires loss prevention employees to follow the apprehension guidelines in its Loss Prevention Manual. Ex. 7. In this case, VanHoute failed to follow the rules set forth in the manual.[3]

1. The state failed to prove that VanHoute's use of force was reasonable.

The J.C. Penney Loss Prevention Manual provides apprehension procedures to ensure everyone's safety. Ex. 7 p. 39. As VanHoute described, such guidelines are necessary to avoid fear and confusion:

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[3] J.C. Penney prohibits apprehension by those who are not "team members trained and certified to make apprehensions." Ex. 7, p. 34. Mr. VanHoute was previously disciplined for failing to follow the guidelines. RP (1/27/15) 83. His right to make apprehensions was also frozen as a result. RP (1/27/15) 87. At trial, he claimed that his right had been reinstated prior to this incident. RP (1/27/15) 86-88.

> [Sometimes] people don't understand that this is actually a detention or a lawful detention, and so they try to jump in to save the person because particularly, you know, you're an innocent bystander, you're watching somebody like get thrown on the ground and your first instinct is to try to help or call 911… RP (1/27/15) 16.

Here, VanHoute did not follow the requirements outlined in the manual.

First, J.C. Penney loss prevention employees are instructed not to make apprehensions alone. Ex. 7, p. 39. VanHoute was by himself when he apprehended Ms. Cantley. Ex. 4; RP (1/27/15) 33.

Second, loss prevention employees are required to approach calmly, identify themselves by name and position, and show their badges. Ex. 7, p. 39. When VanHoute approached Ms. Cantley, he did not state his name or show his badge. RP (1/27/15) 73. He admitted he has an "aggressive tone of voice…" RP (1/27/15) 71. Rather than calmly identifying himself by name, he loudly and repeatedly stated that he was loss prevention, and that she was being detained for theft… RP (1/27/15) 15-16, 29, 73, 157. He twice grabbed her arm. RP (1/27/15) 30.

Third, J.C. Penney requires consent before a loss prevention officer may search a purse for merchandise. Ex. 7, p. 40. VanHoute grabbed Ms. Cantley's purse without her consent, and engaged in a tug-of-war. RP (1/27/15) 29, 30, 31, 93.

Fourth, J.C. Penney's Loss Prevention Manual contemplates the use of force only in rare instances, and instructs loss prevention employees to discontinue surveillance when anyone's safety could be at risk. Ex. 7, p. 39. VanHoute's training included knowing "when to break off and how to break off." RP (1/27/15) 17.[4]

VanHoute failed to follow the J.C. Penney's guidelines when he apprehended Ms. Cantley. His use of force was unreasonable under the circumstances. Because of this, the detention was unlawful.

There was insufficient evidence to prove a lawful apprehension, as required for a conviction of third-degree assault. *Hoffman*, 35 Wn. App. at 16. Ms. Cantley's conviction must be reversed and the charge dismissed with prejudice. *Irby*, 187 Wn. App. 183 at 204.

2. There was insufficient evidence to prove that VanHoute had reasonable grounds to detain Ms. Cantley.

Vanoute also failed to follow the manual when he investigated Ms. Cantley prior to confronting her.

[4] He received little training in the use of force. He "imagine[d]" that he received training on use of force from J.C. Penney at some point. RP (1/27/15) 76-77. He took a community college class on how to detain people and he was trained to use handcuffs. RP (1/27/15) 13. VanHoute did not know the actual term for the force he used in pushing Ms. Cantley to the ground, noting, "I'm sure there's a name for it, but I don't know what it is." RP (1/27/15) 109.

First, instead of finding a female loss prevention employee, he himself monitored Ms. Cantley when she went into the fitting room and exited ten minutes later. RP (1/27/15) 21-22, 50. J.C. Penney requires that fitting room observation be done by a person of the same gender as the customer. Ex. 7, p. 35.

Second, neither he nor anyone else counted the items Ms. Cantley took into the fitting room. This, too violated the loss prevention manual. Ex. 7, p. 34; RP (1/27/15) 54-55.

Third, after Ms. Cantley left the fitting room, VanHoute personally checked the room for merchandise, violating the requirement that fitting room checks be done by a person of the same gender. Ex. 4, 7, p. 35; RP (1/27/15) 24, 50, 80. This also meant that he did not have continuous observation of her after she left the fitting room.

Fourth, he did not have anyone check to make sure that the fitting room was clean of merchandise prior to Ms. Cantley's entry. This also violated the loss prevention manual. Ex. 7, p. 34; RP (1/27/15) 55-56.

VanHoute failed to follow store manual guidelines prior to detaining Ms. Cantley. Because of this, he lacked reasonable grounds to detain her at the time he approached her and grabbed her arm. The prosecution failed to prove a lawful detention.

The evidence was insufficient to convict Ms. Cantley of third-degree assault. Her conviction must be reversed and the charge dismissed with prejudice. *Irby*, 187 Wn. App. at 204.

3. The state failed to prove that Ms. Cantley intended to resist apprehension.

To prove even a *prima facie* case, the state's evidence must be consistent with guilt and inconsistent with a hypothesis of innocence. *State v. Brockob*, 159 Wn.2d 311, 329, 150 P.3d 59 (2006) (addressing *prima facie* evidence in the *corpus delicti* context).

The evidence at trial showed that Ms. Cantley slapped VanHoute only after he'd grabbed her purse and held onto her arm. The only direct evidence of her mental state was that she "got scared" and her "adrenaline kicked in." RP (1/27/15) 30, 74, 116, 127, 154.

The state didn't prove beyond a reasonable doubt that Ms. Cantley's intent at the time she struck VanHoute was to resist or prevent the apprehension. Instead, the evidence was entirely consistent with a hypothesis of innocence—that she struck him out of fear. Accordingly, the state did not present even *prima facie* evidence, much less proof beyond a reasonable doubt, that she had the requisite level of intent.

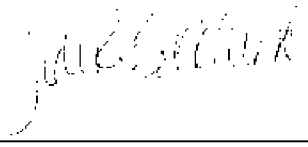
Because the evidence of intent was insufficient for conviction, the conviction must be reversed. The charge must be dismissed with prejudice. *Irby*, 187 Wn. App. at 204.

CONCLUSION

Ms. Cantley's conviction for third-degree assault must be reversed. The charge must be dismissed with prejudice because the evidence was insufficient for conviction. In the alternative, the case must be remanded for a new trial.

Respectfully submitted on August 19, 2015,

BACKLUND AND MISTRY



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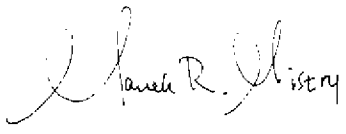

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CERTIFICATE OF SERVICE

I certify that on today's date:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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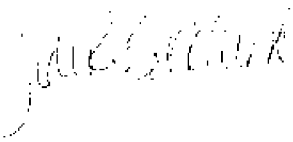

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